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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

H.C. ELLIOTT, INC.

Petitioner,

v.

CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, a pension trust,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In accordance with Rule 28.1 of the Rules of this Court, H.C. Elliott Inc., a California corporation, states that Elliott Homes, Inc., an Arizona corporation, and Elliott Mortgage, a California partnership, are affiliate companies.

QUESTION PRESENTED

The sole question presented is:

Is a property owner who utilizes the services of a construction contractor to develop property, an "employer continuing to perform work" within the jurisdiction of a construction labor agreement for purposes of determining withdrawal liability pursuant to 29 U.S.C. section 1383(b)(2)?

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Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner H. C. Elliott, Inc. (hereinafter "Elliott") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 2, 1989.

OPINION BELOW

The opinion of the Court of Appeals (*H. C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California*, 859 F.2d 808 (9th Cir. 1988) is contained in Appendix B attached hereto. The Memorandum and Order of the District Court for the Northern District of California 663 F. Supp. 1016 (N.D. Cal. 1987) appears in Appendix A attached hereto.

JURISDICTION

Judgment of the Court of Appeals for the Ninth Circuit was entered on October 21, 1988. The Court of Appeals filed its Order denying H.C. Elliott's Petition for Rehearing and rejecting the suggestion for rehearing, *en banc,* on February 2, 1989. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

STATEMENT OF THE CASE

Elliott brought this action for declaratory and injunctive relief arising out of the Carpenters Pension Trust Fund's (hereinafter "Trust Fund") assessment of pension withdrawal liability. The action was brought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 and § 4301(a)(1) of ERISA, 29 U.S.C. § 1451. Elliott sought a declaration that, under the applicable statute 29 U.S.C. § 1383(b), it was no longer an employer performing work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required thereby rendering invalid any imposition of withdrawal liability. It also sought to enjoin the Trust Fund from collecting the withdrawal liability that it had imposed.

The Trust Fund countercomplained to enforce payment of the $750,953 withdrawal liability it had imposed on Elliott. Both parties moved for summary judgment.

The United States District Court for the Northern District of California, the Honorable Robert F. Peckham presiding, entered a summary judgment on July 2, 1987, in favor of the Trust Fund finding that Elliott had continued to perform carpentry work by contracting with independent companies to perform carpentry work of the type for which contributions were previously required.

Elliott appealed the decision of the District Court to the United States Court of Appeals for the Ninth Circuit. On October 21, 1988, the Court of Appeals affirmed the decision of the District Court granting the Trust Fund's motion for summary judgment.

On November 4, 1988, Elliott filed its Petition for Rehearing and Suggestion for Rehearing En Banc, in the United States Court of Appeals for the Ninth Circuit. On February 2, 1989, the Court of Appeals denied Elliott's Petition for Rehearing and Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

This is a case of first impression involving important questions of federal labor law, national labor policy, and employee benefits law. The decision below is in direct conflict with decisions of two other United States Courts of Appeals and with federal labor law, national labor policy and employee benefits law.

INTRODUCTION

This case involves the issue of withdrawal liability from a multiemployer pension plan in the construction industry. Prior to November 1982, Elliott was doing business as a construction company and directly employed carpentry employees. In November of 1982, Elliott closed down business as a construction company and, since that time, Elliott has performed no

carpentry work and has employed no carpentry employees. However, as a property owner Elliott has utilized the services of construction contractors which do employ carpenters to develop its property.

On October 26, 1984, Elliott received a letter from the Carpenters Pension Trust Fund for Northern California dated October 24, 1984, which notified Elliott that it had withdrawn from the Carpenters Pension Trust Fund within the meaning of section 4201 of ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA") (29 U.S.C. § 1381). As a result, the letter stated, Elliott owed the Carpenters Pension Trust Fund multiemployer withdrawal liability in the amount of $750,953.

The decision below, by the Court of Appeals for the Ninth Circuit, involves a question of first impression in the United States Supreme Court. The question is: Whether a property owner who utilizes a construction contractor to develop property is an "employer" engaged in the building and construction industry for purposes of determining withdrawal liability from a multiemployer pension plan under 29 U.S.C. § 1383(b)(2). In answering this question the Court must also decide who is an employer "performing work" as specified in 29 U.S.C. § 1383(b)(2). Generally, an employer which, like Elliott, ceases to contribute to a pension plan will incur withdrawal liability. However, Section 1383(b)(2) creates a special exception for the construction industry whereby a construction employer will incur liability only if it continues as an employer performing work of the type for which contributions were previously required. Thus, Elliott would incur withdrawal liability only if it continued to be an employer performing carpentry work.

The Court below held that by using construction contractors in the development of real property, Elliott continued to be an employer performing carpentry work.

This decision conflicts with the decision of the United States Court of Appeals for the Second Circuit in *ILGWU National Retirement Fund v. Levy Brothers Frocks*, 846 F.2d

879 (2d Cir. 1988), concerning the impact of the use of independent contractors on withdrawal liability. The decision also conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in *Union Asphalt and Road Oils, Inc. v. Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988).

Finally, the decision below conflicts with the national labor and employee benefit policy as announced by Congress to narrowly limit pension withdrawal liability for employers who cease to be employers in the building and construction industry. In addition, the decision below misinterprets the statute, overlooks material facts in reaching its decision and cites inadmissible evidence as part of the basis for its ruling.

I. The Court's Decision That Doing Business With Construction Contractors Makes Elliott A Construction Industry Employer Conflicts With Decisions Of Other Courts Of Appeal.

ERISA itself provides no express definition of the phrase "employer" that "continues to perform work" and the Ninth Circuit, heretofore, had not ruled as to what constitutes a construction "employer" under MPPAA. However, other Courts that have recently addressed that issue have clearly stated that a company that engages the services of an independent contractor is not an "employer" subject to withdrawal liability. *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund et al.*, 632 F. Supp. 630 (S.D. N.Y. 1986); *see, also In Re Seatrain Lines, Inc.* 46 BR 320 (S.D. N.Y. 1985).

In *ILGWU Nat. Retirement Fund v. Levy Brothers Frocks*, 846 F.2d 879 (2d Cir. 1988) the Second Circuit cited with approval the decision in *Refined Sugars II*, 632 F. Supp. 630. It stated:

> The question presented in the *Refined Sugar's* litigation was whether a sugar refiner that had employed an independent trucking company to operate its fleet of trucks was an "employer" with respect to the employees of the trucking company. *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 632 F. Supp. 630, 631

> (S.D.N.Y. 1986) (*Refined Sugars II*). In *Refined Sugars II*, the Court concluded that the refiner was not an "employer" within the meaning of MPPAA since (1) the refiner was not the "direct employer" of the covered employees, *see* 29 U.S.C. Section 1002(5); and (2) the refiner and the trucking company were not under common control within the meaning of 29 U.S.C. Section 1301(b)(1).

Id. at 885.

In *Refined Sugars,* the New York District Court noted that the broadly construed definitions of "employer" in Title I of ERISA does not apply to resolve a withdrawal liability question arising under Title IV. The Court emphasized that the Title I definition of employer is specifically limited by the phrase "for purposes of this title." *See also Nachman v. PBGC*, 446 U.S. 359, 370 (1980); *Glover v. SDR Cartage Co., Inc.*, 681 F. Supp. 1293, 1295 (N.D. of Ill. 1988). *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 632 F. Supp. 630, 632 (S.D.N.Y. 1986).

The Court in *Refined Sugars* also noted that a company which contracts with an independent contractor would not be an "employer" under Title IV even if the Title I definition did apply since such a company would act neither directly as an employer nor indirectly in the interest of the independent contractor in relation to the Fund. *Id.* The uncontroverted evidence in the present case clearly establishes that Elliott did not act directly as an employer or indirectly in the interest of the independent carpentry companies with which it contracted. Since November 1982, Elliott has had no employees who were performing carpentry work.

It is undisputed that the construction companies that Elliott did business with were independent contractors. It was the independent companies, not Elliott, that acted "directly as an employer. . . . in relation to" the Fund. Thus, neither under Title IV nor under Title I is there a basis for concluding that Elliott was an employer, or continuing to perform work, so as to be subject to a claim for withdrawal liability.

A company which contracts with an independent contractor is presumed not to be the employer of the independent contractor's employees. *Avis Rent-A-Car Systems, Inc. v. United States,* 503 F.2d 423, 430 (2d Cir. 1974). The Pension Fund has clearly failed to overcome this presumption.

The only logical interpretation of the word "employer" as used in Section 1383(b)(2) is that it means that the employer is the entity directly employing the employees performing the work in question. Here the work in question is carpentry work and *Elliott employed no carpenter employees after November 1982.*

Nor was Elliott engaged in the business of marketing carpentry services. Elliott simply did business with construction companies in the course of developing its own property.

II. The Decision Below Conflicts With The Legislative Intent Of The Statute Because Elliott's Conduct Did Not Result In A Significant Elimination of Jobs From The Contribution Base.

The House of Representatives, in reporting on construction industry withdrawal liability under MPPAA, stated:

> The [Ways and Means] Committee believes that, because in the construction industry and in certain segments of the entertainment industry, the withdrawal of an employer from a Plan may not eliminate jobs from a Plan's contribution base unless the employer continues work in the area, liability for employers in these industries should be *narrowly limited.*

H.R. Rep. No. 869, 96th Congress, 2d Sess., reprinted 1980: 4 U.S. Code Cong. and Admin. News 3004 (emphasis added).

The decision below would also overlook the fact that in the instant case, Pension Fund contributions were made subsequent to November 1982 for the overwhelming majority of employees of the independent companies with whom Elliott contracted. Some 80 percent of the contractors had labor agreements with the Carpenters Union. If Elliott is required to pay withdrawal liability, it will be contributing for the same work for which the

independent companies have been contributing since 1982. Such an absurd windfall to the Fund could not be what Congress intended when it sought to "narrowly limit" construction industry withdrawal liability. At oral argument the appellate panel for the Ninth Circuit indicated that they would not uphold such an absurd result, and yet their decision does exactly that. Indeed, if Elliott is found to be such a "continuing employer" in relation to the employees of these independent contractors, it may mean that Elliott may never have "withdrawn" from the Trust Fund because the contribution level was maintained at 80 percent of the former level.[1]

III. The Court's Opinion Misreads The Statute.

A. The Statute Requires That The Withdrawing Party Remain a Direct Employer In The Construction Industry.

The Court of Appeal in *H. C. Elliott, Inc. v. Carpenters Pension Trust*, 859 F.2d 808 (9th Cir. 1988) observed:

> The flaw in Elliott's argument, however, is that the statute contains no requirement that the withdrawing party remain a direct employer.

Id. at 813.

The flaw in the Court's opinion is that the statute contains exactly this requirement that the withdrawing party remain a direct employer.

The relevant statutory language states that:

> [A] withdrawal [from a multiemployer plan] occurs . . . if . . . an employer ceases to have an obligation to contribute

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[1] In IRS Document 6678 (4-81) it states that a 20 percent reduction in the number of covered participants will not by itself cause a partial termination of a Plan unless there are additional factors such as prohibited discrimination, a potential for reversion, or the 20 percent represented the elimination of a division, a plant closing or the discontinuance of a particular product, in which case such factors add additional weight to the 20 percent figure in making the determination. *See, also, Mehm v. Phillips Petroleum Co.*, 583 F.Supp. 1113 (D. Kan 1984); and *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985).

> under the plan, and . . . *the employer . . . continues to perform work* in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required. . .

29 U.S.C. § 1383(b)(2) (emphasis added).

The words "the employer. . . . continues to perform work" could not be more clear. The statute expressly precluded the rule applied by the Circuit Court. Elliott was at most a real estate developer after 1982. It stopped being a carpentry employer in the construction industry. It is in no logical sense an employer "continuing to perform" carpentry work for withdrawal liability purposes. If Elliott had subsequently operated a bank or insurance company involved in construction loans, would it also have been a "continuing employer" for withdrawal liability purposes? If Elliott had purchased and operated a store, would it have been a continuing construction employer because the store might need construction repairs? *The crucial point is that the employer must under the statute be continuing to perform work which was covered under the contract and for which contributions were formerly required. If an employer is not performing covered work, then no withdrawal has occurred.*

To find that Elliott's doing business with independent carpentry companies rendered it an "employer that continues to perform work" would run counter to the plain language of the statute, the definition of "employer" applied in recent case law, and to the legislative history of the MPPAA set forth above. The decision below completely ignores the legislative exhortation that withdrawal liability for construction industry employers be "narrowly limited."

B. Because Any Obligation To The Plan Arose Out Of Elliott's Former Activities As A Construction Industry Employer, The Court Below Erred In Refusing To Apply The Special Rules For Withdrawal Liability In The Construction Industry.

A *non-construction industry employer* is obligated to pay withdrawal liability to a multiemployer pension trust fund when it permanently ceases to have an obligation to contribute under

the plan or permanently ceases all covered operations under the plan. 29 U.S.C. § 1383(a). However, 29 U.S.C. § 1383(b)(2) expressly provides that *an employer in the building and construction industry does not have a withdrawal if it does not continue to perform work in the jurisdiction of the collective bargaining agreement of the type of which contributions were previously required.*

The Court of Appeal erroneously ruled that 29 U.S.C. Section 1383(a)(1) was determinative as to Elliott's liability for withdrawal from the Multiemployer Pension Plan. (*H.C. Elliott,* 859 F.2d 808 (9th Circuit 1988), at 813.) Neither the legislative history nor the decisions of other Courts that have faced this issue support this holding. Elliott's liability is controlled by Section 1383(b) not 1383(a). In *Union Asphalt and Road Oils, Inc. v. Mo-Kan Teamsters Pension Fund,* 857 F.2d 1230 (8th Cir. 1988) the Eighth Circuit explained:

> Under certain circumstances, however, the Act excuses employers in the building and construction industry from withdrawal liability. For example, an employer in the building and construction industry that goes out of business does not have to pay withdrawal liability to a multiemployer pension plan at that time. H.R. Report No. 869, 96th Congress, 2nd Session, Part 1, at 75-76, U.S. Code Congressional and Administrative News at 2943-44.
>
> *While Section 1383(a) defines "complete withdrawal" for most employers, Section 1383(b) defines complete withdrawal for an employer in the building and construction industry.*

Id. at 1232. (Emphasis added.)

If Elliott incurred any withdrawal liability, it was as a result of its activities as a construction industry employer. To apply a different rule because Elliott ceased to be a construction employer would be to write Section 1383(b)(2) out of the statute. Any company meeting the requirement of ceasing to perform construction would automatically fall within the provisions of Section 1383(a), rendering the exception meaningless. Such a result is absurd statutory construction and contrary to clearly stated legislative intent.

IV. The Court's Reliance On Secondary Liability Under The Former Union Contract Is In Error.

The Court below spun a "secondary liability" argument out of the subcontracting provisions of Elliott's former collective bargaining agreement. In short, the Court found that Elliott was required under the former labor agreement to subcontract work only to union subcontractors and to pay benefit contributions for the employees of subcontractors if the subcontractor failed to do so. The Court reasoned that because the former agreement contained this secondary obligation for work of subcontractors, Elliott was "continuing to perform work" for withdrawal liability purposes by using the services of construction contractors in improving its property.

The Court of Appeal erroneously concluded that secondary liability is the equivalent of performing carpentry work:

> It is clear from the Collective Bargaining Agreement to which Elliott was signatory that Elliott was responsible for payments to the pension fund for all work done either by its own employees or by its subcontractors' employees. Elliott was obliged under the terms of the Collective Bargaining Agreement either to contribute on behalf of its own carpenters, to hire union subcontractors making their own contributions to the fund, or to make up any delinquencies. . . . Elliott continued to do work of the type for which contributions were previously required.

H.C. Elliott v. Carpenters Pension Trust Fund, 859 F.2d 808 (9th Cir. 1988) at 813. There is no statutory language or legislative history under MPPAA that supports the Court's "secondary liability" reasoning. The work covered under the Collective Bargaining Agreement was carpentry work, and prior to November 1982, Elliott made contributions on behalf of its own employees who were performing this type of work. Since November 1982, Elliott has had no employees who were performing carpentry work and has not engaged in the business of providing carpentry services.

It is undisputed that since November 1982 independent carpentry companies have employed all the carpentry employees working on real property owned by Elliott. Where two

companies are truly separate and independent, as indisputably was the case here, they cannot possibly perform the same work at the same time.

It is significant that the statutory history established by the Senate Committee speaks in terms of the employer continuing "to do" covered work. The statute and the statutory history do not say anything about secondary liability for contributions primarily owed by another company. The statute simply says "continues to perform" work. The fact that the company is doing something other than performing work which might have resulted in secondary liability under the former collective bargaining agreement is irrelevant. The sole issue is whether Elliott *continues to perform construction work as an employer.*

Moreover, the Senate Committee and the statute both used the word "continues" which signifies an identical carrying on and not a difference in the performance of the construction work. It is undisputed that Elliott never actually contributed to the Carpenters Pension Plan pursuant to Section 50 of the prior collective bargaining agreement. Therefore, subcontracting carpentry work was certainly not a "continuation" of its former practices under the labor agreement. Nevertheless, the Court of Appeal relies on Section 50 to make the argument that, *hypothetically,* Elliott might have been obligated to contribute. *Id.* More significantly, secondary liability cannot be viewed as tantamount to "performing work." If Congress had meant to focus on potential secondary liability, it could have done so. However, it did not.

If this Court were to sustain the holding that Elliott was responsible for withdrawal liability because of potential secondary liability for the failure of another unrelated company to make benefit contributions, then even companies which were never signatory to a collective bargaining agreement could be hit with ERISA withdrawal liability. This is so because under the current state of law in California, trust funds such as the Appellee are entitled to a lien in the amount of fringe benefit contributions owing under a collective bargaining agreement (Cal. Civ. Code § 3111). Thus, virtually every property owner, by operation of California lien law and federal labor-

management relations law, may be a guarantor of pension fund contributions with or without a contract obligation like Section 50.

Finally, the argument is without merit because to the extent that Elliott formerly had an obligation to utilize only union-signatory subcontractors, it continued to meet that obligation for the vast majority of the work. It is undisputed that after November 1982, 80 percent of the work was performed by union-signatory companies and contributions were paid for that work. Thus, to the extent that the work of subcontractors is relevant in determining withdrawal liability, there has been no withdrawal because there has been no legally significant cessation of contributions. To allow the Trust Fund to enjoy receipt of the pension contributions for that 80 percent of the carpentry work, and at the same time to collect in excess of $750,000 in withdrawal liability from Elliott based on the same work, would be to allow the Trust Fund to obtain a windfall never intended by Congress.

V. The PBGC Letter Relied On By The Court Of Appeal Was Not Properly Part Of The Record Before The Court And Should Be Disregarded.

The Court of Appeal cites as further justification of its conclusion that Elliott was a "continuing employer" a 1985 Pension Benefit Guarantee Corporation ("PBGC") opinion letter. *H.C. Elliott,* 859 F.2d at 813. Appellant's reply brief noted that this PBGC opinion letter was not properly part of the Court record, incorrectly interpreted statutory requirements, and was contradictory of other PBGC letters (Appellant's Reply Brief, attached as Exhibit E, p. 12).

Only after the parties had concluded their supplemental briefing as directed by Court order and the matter stood submitted, did Appellee "discover" and mail this opinion letter to the Court. Documents filed after the entry of an order and which were not before the District Court when it made its order, are not a proper part of the record on appeal and should not be considered on appeal. *See Wood v. Santa Barbara Chamber of Commerce, Inc.,* 705 F.2d 1515, 1519 (9th Cir. 1983); *U.S. v. Cannon,* 534 F.2d 139, 140 (9th Cir. 1976).

In any event, this Court should disregard the aforementioned PBGC letter because it incorrectly interprets the meaning of the statute here at issue and is contradictory of other letters of equal weight.

CONCLUSION

In summary, the decision of the Court of Appeals in this case is contrary to decisions of the Second and Eighth Circuits, is contrary to the weight of law and unsupported by the evidence, is contrary to national labor policy and employee benefits law and policy. For these reasons, Petitioner H.C. Elliott, Inc. respectfully requests that the Court grant its Petition for Writ of Certiorari to review the decision of the Court below and to resolve the conflict among the circuits with regard to this question.

DATED: March 2, 1989.

Respectfully submitted,

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APPENDIX A

H.C. ELLIOTT, INC.

Plaintiff/Counter-Defendant

v.

CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA

Defendant/Conter-Claimant

No. C-85-3528 RFP

United States District Court, N.D. California

July 2, 1987

[1016] Pension trust fund sought to enforce assessment of withdrawal liability against a construction industry employer which had withdrawn from multiemployer pension plan. On cross motions for summary judgment, the District Court, Peckham, Chief Judge, held that: (1) withdrawal liability applied where employer replaced its own employees, covered by pension plan, with employees of subcontractor, at least some of whom were not covered by the pension plan; (2) carpentry work presently performed by combination of employer's employees and subcontractors was "work . . . of the type for which contributions were previously required" within meaning of statute governing withdrawal liability; (3) employer was liable for overdue withdrawal liability payments, plus interest, and was obliged to remain current in its monthly payments; but (4) attorney fees would not be awarded with respect to portions of case relating to statutory interpretation.

Trust fund's motion granted.

1. **Pensions — 105**

Subject to limited exceptions, withdrawing contributor to a multiemployer pension plan in construction industry must exhaust rights to arbitrate before seeking review in federal court, but one of the limited instances where arbitration may be

bypassed is where the issues involved require statutory interpretation. Employee Retirement Income Security Act of 1974, §§ 4202, 4219(b)(2)(A), 4221(a)(1), as amended, 29 U.S.C.A. §§ 1382, 1399(b)(2)(A), 1401(a)(1).

2. **Pensions — 103**

If an employer continues using construction workers but ends its obligation of making contributions to multiemployer pension plan, withdrawing employer is properly assessed for its "fair share" of the pension fund's unfunded liabilities. Employee Retirement Income Security Act of 1974, §§ 4201, 4203(b), (b)(2), as amended, 29 U.S.C.A. §§ 1381, 1383(b), (b)(2).

3. **Pensions — 103**

The work that a construction industry contractor "performs" is not in all cases limited to that which is carried out by its own employees, for purposes of determining withdrawal liability to a multiemployer [1017] pension plan; rather, where employer replaces its own employees, covered by the pension plan, with employees of a subcontractor, at least some of whom are not covered by the plan, withdrawal liability is appropriate. Employee Retirement Income Security Act of 1974, § 4203(b)(2), as amended, 29 U.S.C.A. § 1383(b)(2).

4. **Pensions — 103**

A "small" erosion in contributions to multiemployer pension plan in construction industry by reason of fact that work previously done by contractor's employees is being done by subcontractor's employees, with contributions being made on behalf of most of the subcontractors' employees, results in neither forgiveness nor reduction of withdrawal liability. Employee Retirement Income Security Act of 1974, § 4203(b)(2), as amended, 29 U.S.C.A. § 1383(b)(2).

5. **Pensions — 103**

Carpentry work presently performed by subcontractors, and previously performed by a combination of contractor's own employees and subcontractors, was "work . . . of the type for which contributions were previously required" for purposes of imposing withdrawal liability on employer which had pre-

viously participated in multiemployer pension plan, regardless of whether contractor had made pension payments on behalf of union subcontractors that it had hired while subject to the terms of collective bargaining agreement, where it was liable for such payments. Employee Retirement Income Security Act of 1974, § 4203(b)(2)(B)(i), as amended, § 1383(b)(2)(B)(i).

6. **Pensions — 103**

Fact that multiemployer pension fund would enjoy windfall if contractor had to make withdrawal liability payments while union subcontractors which it employed themselves provided pension contributions on behalf of their employees did not preclude imposition of withdrawal liability. Employee Retirement Income Security Act of 1974, § 4203(b)(2), as amended, 29 U.S.C.A. § 1383(b)(2).

7. **Pensions — 106**

Dispute over withdrawal liability of a construction industry contractor withdrawing from multiemployer pension plan does not suspend the obligation to pay, and thus interest is payable on withdrawal assessments not paid pending final judicial interpretation of applicable statutory language. Employee Retirement Income Security Act of 1974, § 4219(c)(2), as amended, 29 U.S.C.A. § 1399(c)(2).

8. **Pensions — 103**

Where there was no final arbitration decision with respect to withdrawal liability of construction industry employer following withdrawal from multiemployer pension plan, because employer had yet to request arbitration, employer was required to remain current in its monthly payments. Employee Retirement Income Security Act of 1974, § 4221(d), as amended, 29 U.S.C.A. § 1401(d).

9. **Pensions — 107**

Though trust fund was entitled to attorney fees in connection with recovery of delinquent contributions from construction industry employer withdrawing from multiemployer pension plan, award of attorney fees with respect to portions of case related to interpreting statutory language was dis-

cretionary, and was not warranted where neither party had acted in bad faith, award might deter others from seeking statutory interpretations, and substantial positions were presented seeking to resolve significant legal question. Employee Retirement Income Security Act of 1974, §§ 502(g), (g)(1, 2), 4301(e), as amended, 29 U.S.C.A. §§ 1132(g), (g)(1, 2), 1451(e).

John T. Hayden, William F. Terheyden, Littler, Mendelson, Fastiff & Tichy, San Francisco, California, for plaintiff/counter-defendant.

Robert M. Hirsch, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, California, for defendant/counterclaimant.

[1018] **MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT**

PECKHAM, Chief Judge

INTRODUCTION

Plaintiff and counter-defendant H.C. Elliott, Inc. ("Elliott") seeks injunctive and declaratory relief to prevent defendant and counter-claimant Carpenters Pension Trust Fund for Northern California ("Trust Fund") from enforcing an assessment of withdrawal liability in the amount of $750,953. This withdrawal liability was determined under the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1453. Both Elliott and the Trust Fund have moved for summary judgment.

Because this case presented novel issues, the court circulated a proposed order to the parties to obtain additional comment. The court has carefully considered the comments submitted, along with the parties' earlier briefs. For the reasons described below, the Trust Fund's motion for summary judgment is granted.

FACTS

Plaintiff Elliott is engaged in the construction of housing tracts. Prior to June 1983, Elliott was signatory to a collective bargaining agreement, known as the Carpenters Master Agreement for Northern California ("agreement"), with the Carpenters 46 Northern California Counties Conference Board. The agreement required Elliott to make pension contributions to the Trust Fund on behalf of all carpenters hired by Elliott who were covered under the agreement.

Section 50 of the agreement required that an employer subcontract only to employers who also adhered to the agreement. Subsection 5 of this section required the employer to make Trust Fund payments when a subcontractor was delinquent in these payments. Carpenters Master Agreement for Northern California, section 50 ("Work Preservation Contracting and Subcontracting"), Supp. Decl. of Robert M. Hirsch, Feb. 10, 1986, Exh. A.

The agreement expired in June 1983. Negotiations for a new agreement reached an impasse in December 1983. At that time, Elliott ceased to have an obligation to make pension contributions to the Trust Fund under the provisions of 29 U.S.C. § 1392.

Elliott argues that, since November 1982, it has not performed any carpentry work for which it was previously required to make pension contributions, nor has it employed any carpenters or other employees to perform such work. Instead, Elliott alleges that it has contracted with independent carpentry subcontractors to perform the company's carpentry requirements. The president of Elliott, Harry C. Elliott, asserts that more than 80% of the carpentry work performed on Elliott developments since October 1982 has resulted in pension contributions to the Trust Fund through payments by the union carpentry subcontractors. Decl. of Harry C. Elliott, III, Dec. 11, 1985, at 3.

The Trust Fund alleges that Elliott employed as "assistant superintendents" several individuals who performed "warranty work" in each of the three years following 1982. Elliott's

answers to defendant's interrogatories confirm that these assistant superintendents did indeed perform such warranty work from time to time, which included using carpentry tools such as hammers, tape measures, saws, and levels; according to Elliott, if the warranty worker could not perform the needed work himself, he would contact the appropriate subcontractor to do it. *See* Plaintiff's Answers to Defendant's First Set of Interrogatories, Sept. 27, 1985.

Section 46 of the Carpenters Master Agreement provided in pertinent part:

> The Union and Employer agree that when employees are working in a supervisory position above the rank of foreman or general foreman, the individual employer *may* make payments with respect to his work into the Carpenters [1019] Health & Welfare Trust Fund . . . provided, however, the individual employer having made one (1) payment on an employee shall continue to make such payments so long as the employee is in his employ.

See Decl. of Robert M. Hirsch, Jan. 13, 1986, Exh. F (emphasis added).

Elliott argues that assistant superintendents have never been covered employees under the collective bargaining agreement with the carpenters union and that contributions on their behalf have never been required. Elliott also alleges that, although voluntary contributions are allowed under the collective bargaining agreement, it has never made such voluntary contributions. According to Elliott, whenever employees were promoted from covered work to assistant superintendent, the company stopped making contributions to the Trust Fund for those employees and instead enrolled them in the H.C. Elliott Employee Profit Sharing Plan, which covers Elliott's management and nonunion employees. The Chief Financial Officer and Secretary of Elliott maintains that the field representative of the Carpenters Trust Fund Administration Office agreed that the promotion of four individuals from covered work to assistant superintendent meant that Elliott would no longer have to contribute to the Trust Fund on their behalf. Decl. of Stephen Hemington, Jan. 26, 1986, at 3. A letter from the Trust Fund

Administration Office states that the field representative "did not find any instances of improper reporting by [Elliott]." Decl. of Stephen Hemington, Jan. 3, 1986, Exh. 1.

DISCUSSION

[1] ERISA provides that the sponsor of a multiemployer pension plan determines initially when there has been a "withdrawal" from a pension plan by an employer and the resulting amount of liability on the part of that employer. 29 U.S.C. § 1382. The withdrawing contributor may ask the sponsor to review its determinations, 29 U.S.C. § 1399(b)(2)(A), but "[a]ny dispute between an employer and the plan sponsor ... concerning a determination made under section 1381 through 1399 of... title [29] *shall* be resolved through arbitration." 29 U.S.C. § 1401(a)(1) (emphasis added).

The mandatory arbitration provision has withstood several constitutional challenges. *See Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1404-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, 105 S. Ct. 2116, 85 L. Ed. 2d 481 (1985). Thus, subject to limited exceptions, a withdrawing contributor must exhaust its right to arbitrate before seeking review in federal court.

One of the limited instances where arbitration may be bypassed is where the issues involved require statutory interpretation. In such cases, exhaustion of arbitrative remedies is not required. *See I.A.M. National Pension Fund v. Stockton Tri Industries*, 727 F.2d 1204, 1209 (D.C. Cir. 1984); *I.A.M. National Pension Fund v. Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1294 (N.D. Cal. 1983). In bringing its action in this court, Elliott relies upon this exception to the mandatory arbitration provision of the MPPAA for statutory interpretation.

The MPPAA imposes liability upon a contributor to a multiemployer pension plan when the contributor "withdraws" from the plan, either completely or partially. 29 U.S.C. § 1381. A special definition of "complete withdrawal" for use in the building and construction industry is found at 29 U.S.C. § 1383(b). The relevant portion of that section provides that

withdrawal occurs if (a) "an employer ceases to have an obligation to contribute under the plan," and (b) the employer "continues to perform work . . . of the type for which contributions were previously required." 29 U.S.C. § 1383(b)(2).

The parties agree that, in this case, Elliott ceased to have an obligation to contribute under the plan in December 1983. Thus, the determination of whether withdrawal occurred in this case hinges on whether Elliott "continue[d] to perform work . . . of the type for which contributions were previously required" after December 1983. Elliott asks that the court construe this statutory language.

[1020] A. Does Elliott "Continue[] to Perform Work of the Type for Which Contributions Were Previously Required"?

1. **"Continue[] to Perform Work."**

The Trust Fund argues that Elliott "continues to perform work," albeit indirectly, by hiring subcontractors to perform the company's carpentry needs. The use of such subcontracting requires that the court interpret the MPPAA in a context where no other federal court appears to have made an adjudication.

Elliott maintains that it ceased engaging in carpentry work in November 1982. It alleges that it no longer hires employees to undertake carpentry work; instead, Elliott hires independent subcontractors, who then hire employees to perform this type of work. Elliott argues that the companies with which it has contracted to perform carpentry work are totally separate and independent from Elliott. Each is an independent employer in its own right and, according to Elliott, completely responsible for its own employees' working conditions, compensation, and pension contributions.

Elliott asserts that it now purchases carpentry services that it formerly produced itself. The companies from which it buys are entities that "perform" the carpentry services, according to Elliott. The company therefore argues that it is a consumer where it was once a producer. As a consumer, Elliott argues, it does not "perform" carpentry services. Elliott thus asks that the court render judgment in its favor based on the argument that

by no longer performing carpentry services directly, but instead purchasing the services of subcontractors, Elliott no longer "performs" work within the meaning of 29 U.S.C. § 1383(b)(2). In contrast, the Trust Fund argues that, by replacing its own employees with independent carpentry subcontractors, Elliott still causes carpentry work to be "performed." Neither the Trust Fund nor Elliott has provided the court with case law or legislative history dealing specifically with the statutory meaning of an employer's "performing" work under § 1383(b)(2).

However, the Supreme Court has articulated the intent of Congress in imposing liability on withdrawing employers generally under the MPPAA. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986). Although the Court there was speaking to the overall purpose of the MPPAA, the underlying case did come from the construction industry. *Id.* 106 S. Ct. at 1022. The Court first quoted the Executive Director of the Pension Benefit Guaranty Corporation as proposing:

> [A]n employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. . . .
>
> . . . .
>
> We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan.

Id. The Court went on to note that "[a]fter 17 months of discussion, Congress agreed with the analysis put forward in the PBGC Report, and drafted legislation which implemented the Report's recommendations." *Id.*

Further, the legislative history of the MPPAA provides insights into the rationale Congress had for treating the construction industry differently from other industries for purposes of imposing withdrawal liability. That history reflects congressional awareness that many employers in the construction

industry enter and leave the industry and that workers shift from employer to employer. Even if a pension plan is underfunded, as long as each current employer of a particular employee pays into the pension plan, the underfunding problem can presumably be deferred indefinitely into the future. The Trust Fund quotes the following passage from the legislative history of the MPPAA in the House of Representatives:

> In the construction industry, the funding base of the plan is construction projects in the area covered by the [1021] collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors that continue to work within the plan's area. It exempts from liability employers that cease contributions because they have no work in the area; there is no liability when a company goes out of business, is sold, or is simply without work for a time.

H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 75-76, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2943-44. In arguing that the MPPAA imposes liability on Elliott in this case, the Trust Fund apparently relies on the above statement that the pension plan will be secure "as long as contributions are made for whatever work is done in the area."

Elliott provides an excerpt from the corresponding legislative history in the Senate:

> [I]n [the construction] industr[y] an employer's leaving the jurisdiction of the plan or going out of business does not typically reduce the plan's contribution base. Rather, an employer reduces the plan's contribution base only if it continues to do what would have been covered work but does not have an obligation to contribute to the plan for that work. In order to protect the plan, that continuation of work without contributions is treated as withdrawal in [the construction] industr[y].

Senate Comm. on Labor and Human Resources, Summary and Analysis of Consideration of S. 1076, 96th Cong., 2d Sess. 13 (1980).

Elliott also quotes the following passage from the MPPAA legislative history in the House: "because in the construction industry . . . the withdrawal of an employer from a plan may not eliminate jobs from a plan's contribution base unless the employer continues working in the area, liability for employers in [this] industr[y] should be narrowly limited." H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2, at 15, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 3004. Elliott urges that this passage supports its contention that the statutory language "continues to perform work" should be interpreted narrowly.

[2] Congress' intent in treating the construction industry differently can be distilled down to the following concept: The demand for construction industry workers in a region is generally independent of whether a particular employer stays in business. If one employer leaves, another is likely to come along and replace it. Thus, pension fund contributions will probably continue relatively undiminished, even if one particular employer leaves. However, if an employer continues using construction workers but ends its obligation to make contributions, then the pension fund's future contributions are likely to be diminished accordingly. Such a withdrawing employer is properly assessed for its "fair share" of the pension fund's unfunded liabilities. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018, 1022, 89 L. Ed. 2d 166 (1986).

Elliott therefore overstates the case when it claims that "[i]n construction . . . Congress has generally indicated that withdrawal liability is not to be imposed." Memorandum in Opposition to Proposed Order, Jan. 21, 1987, at 8. Congress intended no such blanket immunity.[1]

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[1] Indeed, a key Supreme Court case upholding the constitutionality of the withdrawal liability provisions of the MPPAA arose from the construction industry. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018, 1022, 89 L. Ed. 2d 166 (1986). The Court did not even find it necessary to discuss whether the employer there was subject to withdrawal liability despite being in the construction industry.

[3] Based on this legislative history, this court rejects Elliott's contention that [1022] the work a building industry contractor "performs" is in all cases limited to that which is carried out by its own employees. Where an employer replaces its own employees, covered by the pension plan, with employees of a subcontractor, at least some of whom are not covered by the pension plan, the employer "reduces the plan's contribution base," which is precisely the problem Congress sought to discourage by imposing withdrawal liability in the construction industry.[2]

[4] Elliott next argues that there has been no substantial erosion of the contribution base in this case because, according to the declaration of Elliott's president, more than 80% of the carpentry work on Elliott's housing developments since November 1982 has resulted in pension plan contributions through union carpentry subcontractors. In theory, therefore, a number of carpenters equal to 80% of those no longer working directly for Elliott have gone to work for another union contractor performing work for Elliott as a subcontractor.

Elliott's contention that 80% of its recent carpentry work has resulted in contributions to the Trust Fund cannot relieve it of withdrawal liability unless this court is willing to make wholesale changes to the statutory language adopted by Congress. Section 1383(b) is simply devoid of any suggestion that a "small" erosion in contributions can either be forgiven or result in a reduced liability. Under the statutory scheme, an employer either "ceases to have an obligation to contribute under the plan" or it does not, and an employer either "continues to perform work" or it does not. If these criteria are met, withdrawal liability is imposed.[3] This might be a different

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[2] Because 29 U.S.C. § 1385, which governs partial withdrawals, is not at issue in this case, the court declines to express an opinion as to whether the legislative intent of the MPPAA would require the phrase "continues to perform work," which appears twice in § 1385(b)(2)(A), to be construed in a similar manner.

[3] Elliott's contentions could also be regarded as an attempt to assert that its withdrawal should be considered a "partial withdrawal" rather than a "complete withdrawal." However, partial withdrawals, with their less severe withdrawal liabilities, are treated under a different section, 29 U.S.C. § 1385, which neither party asserts should control here.

case if 100% of Elliott's carpentry subcontracting work since the time of its withdrawal had been performed by union subcontractors. Such a case would not involve any erosion of contributions. However, the court is not presented with that question.

Nor can it be said that such a bright line test is inconsistent with congressional intent. It serves to prevent employers from "inching away" from a pension trust fund, which indeed appears to be what has happened here. Elliott's asserted 80% figure dates from a December 1985 declaration by its president. The Trust Fund now asserts that a key carpentry subcontractor used by Elliott went non-union in June 1986 and thereafter ceased contributing to the pension plan, so that Elliott's earlier estimate of 80% overstates the current figure. Decl. of Robert M. Hirsch, Jan. 26, 1987, at 2-3.

2. *"Of the Type for Which Contributions Were Previously Required."*

[5] The next question is whether the carpentry work now performed by the subcontractors, and previously performed by a combination of Elliott's employees and subcontractors, was "work . . . of the type for which contributions were previously required" within the meaning of 29 U.S.C. § 1383(b)(2)(B)(i). The answer to this legal question must necessarily turn on the provisions of the collective bargaining agreement that formerly governed Elliott's provision of pension payments.

It should be noted initially that the relevant question is whether Elliott was "an employer that ha[d] *an* obligation to contribute under a plan" with respect to work "of the type for which contributions were previously required." 29 U.S.C. § 1383(b) (emphasis added). The statute does not require that Elliott had the exclusive or even primary obligation, but merely an obligation. Thus, Elliott cannot escape this provision by the subterfuge of arguing that to the extent it previously employed [1023] subcontractors to do carpentry work, contributions to the Trust Fund were primarily the responsibility of the subcontractors rather than Elliott. Such a loophole would be contrary

to the plain words of the statute, and would be inconsistent with the congressional purpose of safeguarding multiemployer pension plans.

Section 50 of the collective bargaining agreement established the following liability on the part of Elliott:

> The individual employer has the *primary* obligation for performance of all conditions of this Agreement. The obligation cannot be relieved, evaded or diminished by subcontracting. Should the individual employer elect to subcontract, the individual employer shall continue to have such primary obligation and in the event his subcontractor defaults in any provision of this Agreement, the individual employer shall be liable for any such default of his subcontractor attributable to work on his job site or job yard in the same manner as if the work had been performed by and the default had been incurred by the individual employer itself.

Carpenters Master Agreement for Northern California, section 50(9), Supp. Decl. of Robert M. Hirsch, Feb. 10, 1986, Exh. A (emphasis added).

The Trust Fund contends, and the plain language of the agreement states, that Elliott had the primary obligation to make pension plan contributions on behalf of employees of any subcontractors. Elliott contends that it was merely a guarantor of payments by its subcontractors. However, because the statute requires only that "an employer . . . ha[d] an obligation to contribute under a plan," it is not necessary to resolve which party is correct. At a minimum, section 50 would have required Elliott to provide pension payments on the part of a subcontractor that failed to make such payments on behalf of its employees. Furthermore, if Elliott had contracted with non-union subcontractors, in violation of subsection 3 of section 50 of the collective bargaining agreement, it surely would have been responsible for the payment of funds to the Trust Fund based on the hours worked by these employees, even though such contributions would not have benefited the non-union employees themselves. *See Walsh v. Schlecht,* 429 U.S. 401, 410, 97 S. Ct. 679, 686, 50 L.Ed.2d 641 (1977). This is

sufficient to make the work of Elliott's carpentry subcontractors "of the type for which contributions were previously required."

Despite contrary assertions by the Trust Fund, the uncontroverted evidence submitted by Elliott shows that Elliott never made pension payments on behalf of the union subcontractors it hired while subject to the terms of the collective bargaining agreement. Supp. Decl. of Harry C. Elliott, III, Aug. 7, 1986, at ¶ 2; Decl. of E.A. Hubbert, Aug. 6, 1986, at ¶ 4. Such evidence does not mean, however, that Elliott did not have liability for payments of this type. The company might well have been required to make payments for the type of work it currently performs. The fact that Elliott currently contracts with non-union subcontractors indicates that, if section 50 of the collective bargaining agreement were still controlling, the company would have to pay pension benefits based on this work (although paragraph 5 of section 50 would limit this liability to 90 days).

The court therefore concludes that Elliott has "withdrawn" under 29 U.S.C. § 1383(b)(2) because it has (a) ceased to have an obligation to contribute under the collective bargaining agreement, and (b) continued to perform work of the type for which contributions were previously required.

3. **Additional Considerations.**

[6] The court is well aware of the potential harshness of this ruling if considerable withdrawal liability is ultimately assessed against Elliott. As Elliott points out, to the extent that the company employs union subcontractors that themselves provide pension contributions on behalf of their employees, then the Trust Fund enjoys a considerable windfall if Elliott must also make withdrawal liability payments. Nevertheless, similar prospects have not [1024] deterred other courts from enforcing the dictates of MPPAA with respect to withdrawal liability. *See New York State Teamsters Conference Pension & Retirement Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003, 1009 (N.D.N.Y. 1985).

Furthermore, this seeming inequity must be considered in light of the congressional purpose of protecting multiemployer

pension plans by discouraging voluntary withdrawals from them. Employers who wish to avoid "inequitable" withdrawal liabilities are free to abstain from withdrawing.

To the extent that the MPPAA imposes sizable and somewhat inequitable payments that serve to deter employers from withdrawing from a union pension system, the court is not at liberty to alter the statutory scheme. Unsatisfied litigants such as Elliott must look to the legislative arena, rather than the court, to obtain relief. As another district court has concluded:

> While it may seem unfair that Bellmont [the defendant] should be socked with over $110,000.00 in withdrawal liability when its own employees may seem to be protected, the Fund is doing nothing more than enforcing the provisions of the MPPAA when it assesses withdrawal liability against Bellmont. . . . This court will not second-guess the legislative wisdom behind the statutory withdrawal liability scheme.

Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking Co., 610 F. Supp. 1505, 1513 (N.D.Ind. 1985), aff'd, 788 F.2d 428 (7th Cir. 1986).

The Supreme Court has noted:

> [A]s to the severity of the economic impact of the MPPAA, . . . to the severity of the economic impact of the MPPAA, . . . [t]he assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. . . . There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme.

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 106 S. Ct. 1018, 1026, 89 L.Ed.2d 166 (1986) (footnote omitted).

Having determined that Elliott is liable for withdrawal liability under the provisions of 29 U.S.C. § 1383(b)(2), the

court need not reach the issue of whether "warranty work" by Elliott's employees also constituted a continuance of work of the type for which contributions were previously required.

B. Determination of Withdrawal Liability.

In its motion for leave to file an amended complaint, filed prior to this motion for summary judgment, Elliott also raises the issue of whether a housing construction site is a "facility" within the meaning of 29 U.S.C. § 1397(a)(2). If so, then the amount of Elliott's withdrawal liability would be reduced.

The amount of withdrawal liability includes, in part, "the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3)." 29 U.S.C. § 1391(b)(1)(B). Paragraph (3) provides that:

> An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—
>
> (A) such unamortized amount; multiplied by—
>
> (B) a fraction—
>
> (i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and
>
> (ii) the denominator of which is the sum of all contributions made for the [1025] most recent 5 plan years ending before September 26, 1980, by all employers. . .

29 U.S.C. § 1391(b)(3). The smaller the numerator in the above fraction, of course, the smaller the product. Thus, if an employer is able to reduce the contributions required before September 26, 1980, it can reduce its overall withdrawal liability.

This decrease in the numerator is precisely the relief provided by 29 U.S.C. § 1397(a), which provides:

> For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980 . . . the amount of contributions . . . allocable . . . to work *performed at a facility at which all covered operations permanently ceased* before September 26, 1980 . . . shall not be taken into account.

29 U.S.C. § 1397(a) (emphasis added).

Thus, if Elliott permanently ceased covered operations (i.e., carpentry services) at a particular housing tract construction worksite prior to September 26, 1980, the amount of withdrawal liability would be reduced if these construction sites constitute "facilities" within the meaning of 29 U.S.C. § 1397(a).

Elliott's motion for leave to amend its complaint provides no authority for its contention that the court would be able to render a legal judgment that construction sites are "facilities" within the MPPAA statutory scheme. Hence, Elliott's motion for leave to amend its complaint in this fashion is denied. This denial is without prejudice to renew the motion if Elliott is able to provide support for its interpretation of "facilities."

C. **Orders For Payment.**

The Trust Fund also seeks orders requiring that Elliott pay it (1) the overdue withdrawal liability payments as determined by the Trust Fund, plus interest; (2) future withdrawal liability payments, as they become due; and (3) attorneys fees. These will be addressed in order.

1. **Overdue Withdrawal Liability Payments, Plus Interest.**

The Trust Fund notified Elliott in October 1984 that it had determined Elliott owed it a withdrawal liability of $750,953. The Trust fund specified that this amount was to be paid in "monthly obligations" of $22,345.83, beginning in December 1984. Elliott has not paid any of this amount.

[7] The MPPAA imposes stringent requirements on employers to pay withdrawal liabilities quickly, and a dispute over liability does not suspend the obligation to pay. 29 U.S.C. § 1399(c)(2) provides:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor . . . beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

Elliott argues, without support, that the Trust Fund's request for an order requiring payment of withdrawal liability is premature until a final judicial interpretation of the statutory language has been rendered. In granting another trust fund's request for an order for an immediate payment of a withdrawal liability assessment, one court stated:

> Congress has made as explicit as possible its overwhelming concern with ensuring the integrity of multiemployer pension plans in the face of employer withdrawal. The Court will not permit the defendants to subvert this policy by using the judicial process as a means of further delaying or avoiding payment of sums which, under the statute, are already due and owing.

Trustees of the Retirement Fund of the Fur Manufacturing Industry v. Lazar-Wisotzky, Inc. 550 F. Supp. 35, 38 (S.D.N.Y. 1982), *aff'd,* 738 F.2d 419 (2d Cir. 1984).

This court agrees that Congress intended that employers pay their withdrawal [1026] assessments and then seek to recover them through arbitration or judicial review. Accordingly, Elliott shall, within twenty days of this order, deposit with the Trust Fund the amount, plus interest, that the Trust Fund has determined to be Elliott's overdue withdrawal liability payments.

1. **Future Withdrawal Liability Payments.**

[8] The Trust Fund also seeks an order requiring Elliott to pay its future monthly obligations of $22,345.83 as they become due. The Trust Fund relies on 29 U.S.C. § 1401(d), which provides in relevant part:

> Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination.

There is no final arbitration decision in this case because Elliott has yet to request arbitration. The statute therefore requires Elliott to remain current in its monthly payments. *See Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628, 641-42 (4th Cir. 1983), cert. denied, 467 U.S. 1259, 104 S. Ct. 3553, 82 L.Ed.2d 855 (1984).

In sum, the court is requiring Elliott to pay its overdue withdrawal assessments, plus interest, as well as its future assessments as they become due. This result means that neither party will gain a collateral advantage, or suffer financial hardship, from pursuing this action for statutory interpretation in the courts. Of course, if Elliott ultimately prevails, it may be entitled to a refund of some or all of these payments.

3. **Attorneys Fees.**

The Trust Fund seeks an award of attorneys fees, basing its request on 29 U.S.C. § 1132(g)(2). That section provides in relevant part:

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title [proscribing delinquent contributions] in which a judgment in favor of the plan is awarded, the court shall award the plan . . . reasonable attorney's fees and costs of the action, to be paid by the defendant . . . .

The Ninth Circuit has held that awards of attorneys fees under § 1132(g)(2) are mandatory. *Operating Engineers Pension Trust v. Reed,* 726 F.2d 513, 514-15 (9th Cir. 1984).

[9] However, the Trust Fund's pursuit of an order for payment of delinquent contributions has been a relatively minor part of this case. Instead, the main emphasis has been a question of statutory interpretation. Awards of attorneys fees

for such actions are discretionary with the court. 29 U.S.C. §§ 1132(g)(1), 1451(e). The Ninth Circuit has provided five factors to guide a discretionary award of attorneys fees under § 1132(g):

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).

Applying these guidelines, this court finds that (1) neither the Trust Fund nor Elliott has acted in bad faith, (2) no evidence has been submitted regarding Elliott's ability to pay an award of fees, (3) an award of fees might deter others from seeking statutory interpretations from the courts, (4) the Trust Fund did seek to resolve a significant legal question regarding [1027] ERISA, and (5) both parties' positions were substantial and non-frivolous. Thus, factors 1, 3 and 5 weigh against an award of fees, factor 4 weighs in favor of an award, and factor 2 was not briefed. Balancing these factors, this court determines that a discretionary award of fees under § 1132(g)(1) is not appropriate.

Accordingly, the Trust Fund is granted an award of attorneys fees and costs limited to the portions of this case directly related to the order for payment of delinquent contributions; no attorneys fees are to be awarded for the portions of this case related to interpreting the statutory language of the MPPAA. The Trust Fund may submit a declaration of counsel detailing attorneys fees and costs it has incurred with respect to the order for payment of delinquent contributions.

CONCLUSION

The court finds that Elliott has "continue[d] to perform work" by subcontracting carpentry work of the type for which it previously had liability to the Trust Fund. Accordingly, the Trust Fund's motion for summary judgment shall, barring the need for determination of additional legal questions by this court, be GRANTED and the parties shall proceed to arbitration to determine the appropriate amount of withdrawal liability in accordance with 29 U.S.C. § 1401(a)(1).

The plaintiff's motion to amend its complaint is DENIED without prejudice.

IT IS SO ORDERED.

APPENDIX B

859 F.2d 808

H.C. ELLIOTT, INC.
Plaintiff-Appellant

v.

CARPENTERS PENSION TRUST FUND
FOR NORTHERN CALIFORNIA

Defendant—Appellee

No. 87-2451
United States Court of Appeals
Ninth Circuit

Argued and Submitted May 13, 1988

Decided October 21, 1988

Multiemployer pension trust fund sought to enforce assessment of withdrawal liability against housing construction employer. The United States District Court for the Northern District of California, 663 F.Supp. 1016, Robert F. Peckham, Chief Judge, entered summary judgment in favor of fund. Employer appealed. The Court of Appeals, Schroeder, Circuit Judge, held that employer continued to do work for which contributions were previously required and incurred withdrawal liability.

Affirmed.

[809]

1. **Pensions**

Housing contractor that subcontracted for carpentry work after withdrawing from multiemployer pension plan remained "employer" within meaning of statute imposing withdrawal liability; "employer" described one that had been signatory employer with respect to plan. Employee Retirement Income Security Act of 1974, § 4203(a)(1), (b)(2), as amended 29 U.S.C.A. § 1383(a)(1), (b)(2).

2. **Pensions**

Housing construction employer that withdrew from multiemployer pension plan and used subcontractors for carpentry continued to do work of type for which contributions were previously required and incurred withdrawal liability. Employee Retirement Income Security Act of 1974, § 4203(b)(2), as amended, 29 U.S.C.A. § 1383(b)(2).

3. **Pensions**

No equitable circumstances permitted housing construction employer to avoid withdrawal liability after it withdrew from multiemployer pension plan and used subcontractors to do carpentry work. Employee Retirement Income Security Act of 1974, § 4203(b)(2), as amended, 29 U.S.C.A. § 1383(b)(2).

4. **Pensions**

Allegedly small erosion of coverage after housing construction employer withdrew from multiemployer pension plan and used subcontractors to do carpentry work was not entitled to forgiveness and did not relieve employer of withdrawal liability. Employee Retirement Income Security Act of 1974, § 4203(b)(2), as amended, 29 U.S.C.A. § 1383(b)(2).

John T. Hayden, Littler, Mendelson, Fastiff & Tichy, San Francisco, California, for plaintiff-appellant.

Robert M. Hirsch, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, California, for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before Schroeder, Noonan and O'Scannlain, Circuit Judges.

Schroeder, Circuit Judge.

This is an action by a housing contractor against the Carpenters Pension Trust Fund for Northern California. The contractor, H.C. Elliott, Inc., sought declaratory and injunctive rulings that it had no liability to the Trust Fund under the withdrawal liability provisions of ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. The Trust Fund counterclaimed seeking an order directing

Elliott to pay its delinquent withdrawal liability payments, to submit disputes concerning withdrawal liability to arbitration and to pay installments as they become due. The case came before the district court on cross motions for summary judgment. The district court granted the Trust Fund's motion and ordered the parties to proceed to arbitration as to the amount of the liability. Chief Judge Peckham's careful opinion is reported at 663 F. Supp. 1016 (N.D. Cal. 1987). We affirm.

The case calls for interpretation of 29 U.S.C. § 1383(b)(2). ERISA provides that when an employer withdraws from obligations under a collective bargaining agreement requiring trust fund contributions, the employer must pay an assessment to the fund. 29 U.S.C. § 1381(a). In the construction industry this obligation is imposed only on withdrawing employers who continue to perform the type of work covered by the agreement. 29 U.S.C. § 1383(b)(2). The principal issue in this appeal is whether Elliott, after its obligations under the collective bargaining agreement ceased, continued to perform such work by contracting with other companies for carpentry work within the carpenters' union jurisdiction.

Elliott is a housing contractor working in Northern California. Up until June of 1983, Elliott was signatory to the Carpenters Master Agreement for Northern [810] California with the Carpenters 46 Northern California Counties Conference Board. Its obligations under the collective bargaining agreement, including its obligation to contribute to a trust fund on behalf of its workers, ceased in December 1983 when negotiations for a new agreement reached an impasse. Beginning in November of 1982, however, Elliott had begun subcontracting its carpentry work and had ceased making contributions to the Carpenters trust fund. Although it continued as a housing contractor, the carpentry work on its projects was done by subcontractors rather than by its own employees.

The subcontracting provisions of the collective bargaining agreement to which Elliott was signatory are important for our resolution of the case. They affect our decision as to whether Elliott is continuing to perform the type of work covered by the agreement. Section 50 of the agreement required that signatory employers subcontract only to contractors willing to comply

with the provisions of the agreement. The agreement further required that when a subcontractor was delinquent in making payments to the trust fund, the signatory employer was required to make those payments. In addition, the agreement placed upon the employer the "primary" responsibility for trust fund payments. Thus, the trust fund could look to a signatory employer for payments to the fund regardless of whether the work was done by employees of that employer or by employees of a subcontractor. Work covered by the agreement, therefore, included work done by subcontractors for purposes of the signatory employer's fund payment obligations.

Also important to our resolution of this case is the statutory history and purpose of withdrawal liability. The statutory provisions on withdrawal liability are part of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381-1453, and constitute amendments to ERISA. MPPAA was enacted to reduce the incentive for employers to terminate their affiliation with multiemployer pension plans. The MPPAA was intended to make it onerous and costly for them to withdraw. H.R. No. 96-869, 96th Cong., 2d Sess., pt. 1, at 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935.

The need for the MPPAA can only be understood in the context of ERISA's history. ERISA was enacted in 1974 because Congress was concerned that employees covered by pension plans were being deprived of anticipated benefits because of employer underfunding of those plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62, 100 S.Ct. 1723, 1726-27, 64 L.Ed.2d 354 (1980). At the initiation of pension plans, employers often guaranteed benefits to employees already employed the required amount of time, even though no contributions had yet been made to the plans to cover the past service. However, although the plans stated that employees would receive certain benefits after a certain length of employment, they also limited the employers' liability to the money actually available in the pension funds. Thus, if employers withdrew from underfunded plans, employees received only part of the benefits they had already earned.

Congress enacted ERISA to protect employees' vested interests. The statute included provisions requiring periodic reports, minimum participation, vesting and funding schedules, and standards of fiduciary conduct for plan administrators. *Id.* at 361 n. 1, 100 S.Ct. at 1726 n. 1. See 29 U.S.C. §1001 *et seq.* In addition, ERISA created the Pension Benefit Guarantee Corporation (PBGC), a wholly owned government corporation that insures covered pension plans and provides benefits if the plans terminate with insufficient assets to support guaranteed benefits. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 2713, 81 L.Ed.2d 601 (1984) *("Gray")*. If the PBGC pays benefits to employees covered by an underfunded plan, it requires reimbursement from the employer. *Id.* at 721, 104 S.Ct. at 2713.

The passage of ERISA in 1974 immediately obligated the PBGC to guarantee the benefits of single employer pension plans. However, the PBGC guarantee of [811] multiemployer pension plans was delayed for a period of time during which the PBGC had discretion to pay benefits and discretion concerning whether an employer should be forced to reimburse. *Id.* at 720-21, 104 S.Ct. at 2713-14. The PBGC often had to guarantee existing plans that would not be fully funded until the point in the future when the employers had contributed enough money to cover all employees, including those with past service credits.

As the date for mandatory coverage of multiemployer pension plans approached, Congress became concerned that the PBGC's upcoming obligation to guarantee those plans would bankrupt the corporation because of the large amount of past liabilities still underfunded in the plans. As a result of this concern, Congress asked the PBGC to prepare a report analyzing the problems faced by multiemployer plans and recommending action. *Id.* at 721, 104 S.Ct. at 2713; S.Rep.No. 95-570, 95th Cong., 1st Sess., pp. 1-4 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 4128, 4129-31.

The PBGC Multiemployer Study found that ERISA did not adequately protect plans from the harm resulting from individual employer withdrawals from multiemployer pension plans:

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage — or force further withdrawals, thereby increasing the inherited liabilities to be funded by an ever decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 215, 106 S.Ct. 1018, 1021, 89 L.Ed.2d 166 (1986) (quoting *Pension Plan Termination Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means,* 95th Cong., 2d Sess. 22 (1978) ("1978 Hearings") (Statement of Matthew H. Lind, PBGC Executive Director)). Based on the PBGC findings, Congress enacted the Multiemployer Pension Plan Amendments Act.

The MPPAA requires that employers withdrawing from multiemployer pension plans pay the unfunded vested benefits attributable to the withdrawing employers' participation. *Connolly,* 475 U.S. at 217, 106 S.Ct. at 1022. As the PBGC Executive Director explained,

> an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal . . . [W]e think that withdrawal liability would cushion the financial impact on the plan.

Id. at 216-17, 106 S.Ct. at 1022 (quoting 1978 Hearings, Statement of Matthew H. Lind, PBGC Executive Director). An employer's withdrawal liability is based upon its proportionate share of the plan's unfunded vested benefits, calculated as the

difference between the present value of vested benefits and the current value of the plan's assets. *Gray,* 467 U.S. at 725, 104 S.Ct. at 2715; 29 U.S.C. §§ 1381, 1391. The basic rule applicable to most industries is that a withdrawing employer must pay its share of unfunded vested benefits.

For the construction industry, however, Congress enacted a somewhat different provision imposing withdrawal liability only when a contractor's obligation to the fund ceased and the contractor continued doing covered work. This provision was enacted because the construction industry as a whole does not necessarily shrink when a contributing contractor leaves the industry; employees are often dispatched to another contributing contractor.

[812] In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area.

H.R.Rep. No. 96-869, 96th Cong., 2d Sess., pt. 1, at 75, *reprinted in* 1980 U.S. Code Cong. & Admin News 2918, 2943, *quoted in H.C. Elliott, Inc. v. Carpenters Pension Trust Fund,* 663 F.Supp. 1016, 1020-21 (N.D. Cal. 1987). The withdrawal of a signatory employer from a plan does not reduce the contribution base if the employer leaves the construction industry and other signatory employers take up the slack.

The withdrawal of any employer from the plan does decrease the base, however, if the employer stays in the industry but goes non-union and ceases making payments to the plan. To take this into account, the MPPAA makes withdrawal liability depend on whether the employer is continuing to do covered work. "[A]n employer reduces a plan's contribution base only if it continues to do what has been covered work but

does not have an obligation to contribute to the plan for that work. In order to protect the plan, that continuation of work without contributions is treated as a withdrawal." *Elliott,* 663 F.Supp. at 1021 (quoting Senate Comm. on Labor and Human Resources, Summary and Analysis of Consideration of S. 1076, 96th Cong., 2d Sess. 13 (1980)). See 29 U.S.C. § 1383(b)(2)(B)(i). Thus the statute provides:

> A withdrawal occurs. . . if. . . an employer ceases to have an obligation to contribute under the plan, and. . . the employer. . . continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required. . . .

29 U.S.C. § 1383(b)(2).

The district court held that because Elliott had an obligation under section 50 of the agreement to make contributions to the plan, including primary responsibility for subcontractor payments, Elliott, by subcontracting its carpentry work, nevertheless continued to perform work for which contributions were previously required. *Elliott,* 663 F.Supp. at 1022-23. It further observed that at least some of the subcontractor's employees were not covered by the plan, so that the contribution base for the plan had in fact been reduced. "Where an employer replaces its own employees, covered by the pension plan, with employees of a subcontractor, at least some of whom are not covered by the pension plan, the employer 'reduces the plan's contribution base.' " Id. at 1022. The court held that because Elliott continues to perform work for which contributions were previously required, it is subject to withdrawal liability.

In this appeal, Elliott first argues that the statutory language requires that it be an "employer" after it withdraws from the plan, and that it is no longer an "employer" because it is subcontracting its carpentry work. This is not an argument which was raised in the district court, and hence Judge Peckham's opinion did not address it. It is, however, an issue of statutory interpretation which we may address in our discretion. *Commodity Futures Trading Comm'n. v. Co Petro Marketing Group, Inc.,* 680 F.2d 573, 581 (9th Cir. 1982). Because it is easily disposed of, we do so.

[1] The relevant statutory language upon which Elliott relies states that

> [A] withdrawal [from a multiemployer plan] occurs. . . if . . . an employer ceases to have an obligation to contribute under the plan, and. . . the employer. . . continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required. . . .

29 U.S.C. § 1383(b)(2). Elliott contends that because it is no longer directly [813] employing any workers doing work within the jurisdiction of the union, it is not an "employer" within the meaning of the statute.

The flaw in Elliott's argument, however, is that the statute contains no requirement that the withdrawing party remain a direct employer. The statute uses the word "employer" only to identify the entity to whom the withdrawal liability provision applies if the entity continues to do work covered by the collective bargaining agreement: "a complete withdrawal from a multiemployer plan occurs when an employer. . . permanently ceases to have an obligation to contribute under the plan." 29 U.S.C § 1383(a)(1). The word "employer" describes one who was a signatory employer with respect to the plan. This Elliott clearly was.

[2] The key question here then, as in the district court, is whether Elliott, after its obligation to contribute under the plan ceased, continued "to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required." It is clear from the collective bargaining agreement to which Elliott was signatory that Elliott was responsible for payments to the pension fund for all work done either by its own employees or by its subcontractors' employees. Elliott was obliged under the terms of the collective bargaining agreement either to contribute on behalf of its own carpenters, to hire union subcontractors making their own contributions to the fund, or to make up any delinquencies. Accordingly, we are in full agreement with the district court when it concluded that regardless of whether the carpentry tools were wielded by Elliott's employees or a subcontractors'

employees, Elliott continued to do work of the type for which contributions were previously required.

This conclusion is in accord with an opinion letter in this record issued by the PBGC stating that an employer is subject to withdrawal liability based on its use of subcontractors if the collective bargaining agreement made the employer responsible for payments on behalf of subcontractor employees. The letter discussed employees ceasing to perform construction work directly, and instead subcontracting their construction work. The PBGC stated that

> [u]nder these circumstances there is no withdrawal *unless the employer would have been obligated to make contributions for work performed by subcontractors under the terminated agreement.* If contributions would not have been required, there would be no withdrawal, because the employer would not be continuing to perform work of the type for which contributions were previously required. (Emphasis added.)

PBGC, Op.Ltr. 85-5 (Jan. 30, 1985)

Even if reasonable minds could differ as to the proper interpretation of the statute, we would be obligated to follow the interpretation in the PBGC ruling because of the deference owed to its rulings and opinions. *See United States v. Turkett,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed. 2d 246 (1981); *Nachman Corp.* 446 U.S. at 371-72, 100 S.Ct. at 1731-32. In addition, the PBGC ruling is consistent with Congressional intent:

> Elliott's contention that the work a building industry contractor "performs" is in call cases limited to that which is carried out by its own employees [must be rejected]. Where an employer replaces its own employees, covered by the pension plan, with employees of a subcontractor, at least some of whom are not covered by the pension plan, the employer "reduces the plan's contribution base" which is precisely the problem Congress sought to discourage by imposing withdrawal liability in the construction industry.

Elliott, 663 F.Supp. 1021-22.

[3] Finally, Elliott argues that even if the statutory language and intent were to require withdrawal liability, it should not be imposed in this case because it would be inequitable to do so. It argues that it has in fact subcontracted its work to subcontractors who have made payments to the fund for the bulk of the work done by the subcontractors' employees. It suggests that the fund will somehow obtain a windfall if withdrawal liability is imposed on Elliott.

[814] Withdrawal liability is designed to require the withdrawing employer to pay its fair share of the fund's preexisting vested obligations which the fund presently lacks projected assets to pay. Congress intended the payment as a condition of an employer's obtaining release from a continuing legal obligation to make payments to the fund, a release which Elliott will now enjoy.

[4] To the extent that Elliott argues that a small erosion of coverage should be entitled to forgiveness, Judge Peckham's opinion hits squarely on the mark:

> Section 1383(b) is simply devoid of any suggestion that "small" erosion in contributions can either be forgiven or result in a reduced liability. Under the statutory scheme, an employer either "ceases to have an obligation to contribute under the plan" or does not, and an employer either "continues to perform work" or it does not. If these criteria are met, withdrawal liability is imposed .... Nor can it be said that such a bright line test is inconsistent with congressional intent. It serves to prevent employers from "inching away" from a pension trust fund, which indeed appears to be what has happened here.

Id. at 1022. We agree.

We are here concerned only with Elliott's contention that equitable considerations should preclude all withdrawal liability. To the extent that there are any legitimate equities which might militate in favor of the contractor in this situation with respect to the amount of its withdrawal liability, they can be considered during the course of arbitration. There are no

equitable circumstances which would permit us to grant the relief that Elliott seeks, which is complete avoidance of withdrawal liability.

The judgment of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
MAR 31 19
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1485

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

H.C. ELLIOTT, INC.,
Petitioner,
v.
CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, a pension trust,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole question presented is:

Whether a housing contractor, which had previously been obligated to make pension contributions for any delinquent carpentry subcontractors, must pay withdrawal liability pursuant to Section 4203(b)(2) of ERISA, as amended, 29 U.S.C. Section 1383(b)(2), after it ceased having an obligation to contribute to a multiemployer pension plan and continued to perform work, of the type for which contributions had been required, through subcontractors.

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H.C. ELLIOTT, INC.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 859 F.2d 808 (9th Cir. 1988) and is contained in Appendix B attached to the Petition for a Writ of Certiorari. The Order of the United States District Court for the Northern District of California is reported at 663 F. Supp. 1016 (N.D. Cal. 1987) and appears as Appendix A to the Petition.

JURISDICTION

Respondent accepts Petitioner's statement of the Court's jurisdiction.

STATUTES INVOLVED

Respondent accepts Petitioner's statement of the statutes involved.

STATEMENT OF THE CASE

Prior to 1983, H.C. Elliott, Inc. (hereinafter "Elliott" or "the Company"), a California housing contractor, was party to a collective bargaining agreement with the Carpenters 46 Northern California Counties Conference Board (hereinafter "Carpenters") requiring fringe benefit contributions to the Carpenters Pension Trust Fund for Northern California (hereinafter "Pension Fund" or "Pension Plan"), a multiemployer pension plan. Elliott terminated its collective bargaining agreement and reached impasse in negotiations with the Carpenters in December 1983, thereby ceasing to have any further obligation to contribute to the Pension Fund.

Although Elliott hired employees directly for several years to perform carpentry work on its construction projects, the company claims that since November 1982, more than one year before withdrawing from the Pension Fund, it performed all carpentry work through independent subcontractors.[1]

The applicable collective bargaining agreement required that signatory employers subcontract covered work only to subcontractors who agreed to adhere to the Carpenters labor agreement. It required, further, that the signatory employer, if he chose to subcontract any carpentry work, remain primarily liable for contributions to the Pension Fund in the event the subcontractor failed to make such contributions.

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[1] Evidence introduced by the Pension Fund reveals that the Company continued to employ "assistant superintendents" and "warranty workers" who performed work previously covered by the bargaining agreement.

Subsequent to terminating its pension contribution obligation, the Company has hired both Union and non-Union carpentry subcontractors, shifting towards the non-Union subcontractors with the passage of time.

The Pension Fund assessed withdrawal liability against the construction company in 1984 and Elliott countered with the underlying lawsuit, refusing to make any withdrawal liability payments. Both the District Court and the Ninth Circuit Court of Appeals ruled in favor of the Pension Fund, concluding that Elliott continued to perform work which had previously been covered by the applicable collective bargaining agreement and for which pension contributions had been required.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT DECISION COMPORTS WITH THE PURPOSES AND POLICIES OF THE WITHDRAWAL LIABILITY PROVISIONS OF ERISA, AS AMENDED, AND DOES NOT RAISE NOVEL ISSUES REQUIRING SUPREME COURT REVIEW

Elliott would have this Court sanction the Company's withdrawal from the Carpenter Pension Plan, shifting Elliott's share of the unfunded, vested liability, calculated as a function of Elliott's years of participation as a contributing employer in the Plan, to the remaining employer-contributors.

In 1980, Congress, relying substantially upon the Pension Benefit Guaranty Corporation (hereinafter "PBGC") Mulitemployer Study of 1978, enacted the Multiemployer Pension Plan Amendments Act (hereinafter "MPPAA") in an effort to address situations similar or identical to the one raised in this case. *Connolly v. PBGC*, 475 U.S. 211, 217 (1986). Of particular concern to Congress was the need to discourage voluntary withdrawals by employers which both reduced the Plan's contribution base and

shifted the withdrawing employer's share of unfunded, vested liability to the remaining employers. *Id.* at 215-217 (quoting, Pension Plan Termination Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong. 2d Sess. 22 (1978)) ("1978 Hearings)".

Through the use of a subcontracting subterfuge, Elliott now seeks to accomplish precisely what Congress sought to thwart with the 1980 withdrawal liability amendments to ERISA. Were Elliott permitted to withdraw as a contributing employer from the Carpenters Pension Fund without paying withdrawal liability, its prorata share of the unfunded, vested liability would be redistributed by the Plan to the remaining employers. See Section 4211(b)(4) of ERISA, 29 U.S.C. § 1391(b)(4). Coupled with the lost contribution base occasioned by Elliott's withdrawal (and the lost contributions from Elliott's subcontractors), the Pension Fund would have to turn to the remaining employers for additional revenues.[2] The obvious incentive for all remaining contractors would be to subcontract all carpentry work and withdraw from the Plan as soon as possible. This ". . . vicious downward spiral (might) continue until it (was) no longer reasonable or possible for the Pension Plan to continue." *Connolly* at 215 (quoting the "1978 Hearings"). The Circuit Court below refused to countenance such a strategy.

The Ninth Circuit opinion in *Elliott* is also consistent with the 1985 PBGC Opinion Letter addressing the withdrawal liability/subcontracting issues. Said the PBGC:

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[2] While Elliott suggests 80% of its post-withdrawtl carpentry work was performed by Union subcontractors, its largest carpentry subcontractor withdrew from the Pension Plan less than three years after Elliott did. Moreover, the contributions from any Union subcontractor employed by Elliott after withdrawal were calculated to substantially offset the additional, newly accruing liabilities attributable to the subcontractor's employees.

> "(u)nder these circumstances there is no withdrawal unless the employer would have been obligated to make contributions for work performed by the subcontractors under the terminated agreement. If contributions would not have been required, there would be no withdrawal, because the employer would not be continuing to perform work of the type for which contributions were previously required. PBGC Opinion Ltr. 85-5 (January 30, 1985).

The PBGC Opinion Letter, which is accorded deference by the Courts (see, for example, *U.S. v. Turbett*, 452 U.S. 576, 580 (1981); *Nachman Corp. v. PBGC*, 446 U.S. 359, 371-72 (1980)), underscores the significance of the subcontracting provision of Elliott's collective bargaining agreement, holding the signatory employer primarily liable for any of its subcontractors delinquent pension contributions. Certiorari should not be granted where a circuit court relies so heavily upon the factual particularities of the case.

II. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF ANY OTHER COURTS OF APPEAL

In a well reasoned, yet concise opinion, the Ninth Circuit concluded that H.C. Elliott, Inc. continued to operate as a housing contractor in Northern California, performing carpentry work through its subcontractors; work for which Elliott had previously been obligated to pension contributions.[3] The Circuit Court stated the following:

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[3] Although Elliott frames the Question Presented by asking whether a property owner who hires a contractor may be deemed an employer performing work in the construction industry, nothing in the decision below addresses such an issue nor was it raised by the Petitioner. Instead, the Court determined that Elliott, a housing developer, continued to perform work, albeit through subcontractors, within the jurisdiction of the collective bargaining agreement for which contributions were previously required.

> "The key question here then, as in the District Court, is whether Elliott, after its obligation to contribute under the Plan ceased, continued 'to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required.' It is clear from the collective bargaining agreement to which Elliott was signatory, that Elliott was responsible for payments to the Pension Fund for all work done either by its own employees or by its own subcontractor employees. Elliott was obliged under the terms of the collective bargaining agreement either to contribute on behalf of its own carpenters, to hire Union subcontractors making their own contributions to the Fund, or to make up any delinquencies. Accordingly, we are in full agreement with the district court when it concluded that regardless of whether the carpentry tools were wielded by Elliott's employees or a subcontractors' employees, Elliott continued to do work of the type for which contributions were previously required." 859 F.2d at 813.

No other circuit court has addressed this issue. In fact, the district court below noted that the ". . . case presented novel issues, . . .". See, A-4 to Appendix A to Petition.

Neither circuit court case cited by Elliott as conflicting touches upon the issues here. In *ILGWU National Retirement Fund v. Levy Brothers Frocks*, 846 F.2d 879 (2nd Cir. 1988) the Court acknowledge the following:

> "The key issue on appeal is whether the corporation (appellee) is precluded from challenging the Fund's determination of withdrawal liability because the corporation did not seek to arbitrate the question." *Id.* at 884.

The Court in *Levy Brothers Frocks*, noting that the corporation's former employees were covered by the Fund, held that the corporation had an obligation to

arbitrate the withdrawal liability dispute notwithstanding the fact that the liability claim included calculations based upon a predecessor's contributions. The decision is actually consistent with the *Elliott* decision of the Ninth Circuit Court since the corporation was deemed an employer by virtue of its prior, pre-withdrawal, relationship to its employees and the Fund.[4]

The issue in *Union Asphalt and Road Oils, Inc. v. Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988) was whether the employer, which distributed asphalt and road materials, operated within the "building and construction industry" thereby falling within the purview of Section 4203(b) of ERISA, as amended. 29 U.S.C. § 1383(b). The Court found the employer to be outside the construction industry but was not asked to address issues raised in our case. Neither the *Levy Brothers Frocks* decision nor the *Mo-Kan* decision present the type of direct conflict between the circuits justifying a grant of certiorari. See, for example, *Marks v. U.S.*, 430 U.S. 188, 189 fn.1 (1977); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976).

CONCLUSION

The Ninth Circuit decision below comports with the legislative intent behind the 1980 Withdrawal Liability Amendments to ERISA. It is consistent with the PBGC pronouncement on point and conflicts with no courts of

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[4] Elliott now insists upon characterizing the Ninth Circuit decision below as one which incorrectly holds Elliott to be the employer of its subcontractor's employees. The Ninth Circuit made no such holding. Rather, it concluded, as did the Court in *Levy Brothers Frocks*, that the subject company was the direct employer of employees for whom contributions were made while the collective bargaining agreement was in effect. *H.C. Elliott* at 812-13; *Levy Brothers Frocks* at 885.

appeals decisions. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

H.C. ELLIOTT, INC.

Petitioner,

v.

CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, a pension trust,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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The Carpenters Pension Trust Fund for Northern California, in its opposing brief in No. 88-1485, fails to effectively rebut any of Petitioner's arguments in its petition for a writ of *certiorari.* Instead, the Carpenters Pension Trust Fund for Northern California (hereafter "Trust Fund") sidesteps the issues before the Court in order to deliver a sermon extolling the virtues of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA") (29 U.S.C. §§ 1381-1453). The virtues of the MPPAA are not, however, the issue in this case. The issue before this Court is who is an employer "continue[ing] to perform work" within the jurisdiction of a construction labor agreement for purposes of determining withdrawal liability under 29 U.S.C. § 1383(b)(2).

In its panic to prevent a careful review of the lower courts' decisions, the Trust Fund takes two contradictory positions. Its first reason for arguing against the issuance of a writ is that the decision below does not raise novel issues requiring Supreme Court review (Brief in Opposition, p. 3).

However, just three pages later the Trust Fund emphatically points out:

> No other circuit court has addressed this issue. In fact, the district court below noted that the '. . . case presented novel issues, ...'

Brief in Opposition, p. 6.

The Trust Fund thus asks this Court to chart a course between the Scylla of the general virtues of multiemployer withdrawal liability and the Charybdis of its logical conundrum that the question presented is both not novel and novel.

The Trust Fund's attempt by its truncated argument to shift the Court's attention from the enormity of the issue as to who is an employer in the construction industry for pension withdrawal liability purposes, to a case supporting the general principle of proportional employer liability for pension withdrawal liability lays bare the flaw in the Trust Fund's reasoning. If the statute governing withdrawal liability for construction employers could be rewritten so as to do what the Trust Fund says it means, it would have the effect of writing the building and construction industry exception out of the statute. The Trust Fund completely ignores the legislative history with respect to the building and construction industry exception, preferring instead to quote this Court's opinion in *Connolly* v. *PBGC*, 475 U.S. 211, 106 S. Ct. 1018 (1986) at length where this Court upheld the constitutionality of the MPPAA.

I. The Trust Fund Erroneously Argues That The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeal.

The Trust Fund attempts to sidestep the problem of conflict among the circuits by diverting this Court's attention to other issues not relevant to this case. The Trust Fund suggests, "neither Circuit Court cases cited by Elliott as conflicting touches upon the issues here" (Brief in Opposition, p. 6). The Trust Fund does not, however, bother to explain why this is the case.

In *ILGWU National Retirement Fund* v. *Levy Brothers Frocks,* 846 F.2d 879 (2d Cir. 1988), one of the key issues presented was whether or not the defunct Levy Brothers Frocks ("corporation") was an employer subject to MPPAA. The Trust Fund attempts to distinguish *Levy Brothers Frocks* by snatching one sentence out of context and suggesting that this somehow proves the case is not relevant. The Trust Fund quotes the following:

> The key issue on appeal is whether the corporation is precluded from challenging the fund's determination of withdrawal liability because the corporation did not seek to arbitrate the question.

Id. at 884 (Brief in Opposition, p. 6).

The Trust Fund ignores the balance of the paragraph in which this same quote begins that deals with the issue as to who is an employer for withdrawal liability purposes.

> The corporation, however, claims that since it never agreed to the collective bargaining agreement or related agreement during the relevant time period, it was never subject to MPPAA and therefore was not obligated to submit to arbitration. The corporation relies upon *Refined Sugars, Inc.* v. *Local 807 Labor-Management Pension Fund,* 580 F. Supp. 1457, 1462 (S.D.N.Y. 1984) (*Refined Sugars I*) for the proposition that a party cannot be compelled to arbitrate a dispute over withdrawal liability if it is not subject to MPPAA.

Id. at 884.

The Trust Fund incredibly characterizes *Levy Brothers Frocks* as holding:

> That the corporation had an obligation to arbitrate the withdrawal liability dispute notwithstanding the fact that the liability claim included calculations based upon a predecessor's contributions. The decision is actually consistent with the *Elliott* decision

> of the Ninth Circuit Court since the corporation was deemed an employer by virtue of its prior, pre-withdrawal, relationship to its employees and the Fund. .

(Brief in Opposition, pp. 6-7.)

The Trust Fund fails to point out that the corporation in *Levy Brothers Frocks* was one and the same with its predecessor. The Court concluded:

> The corporation's principals, when operating as a partnership, made payments to the Fund for years and, even after the change in the form of doing business from a partnership to a corporation, these benefit payments continued until operations ceased. We need not decide at what point an employer's connection with a fund would be so attenuated as to support a defense that it was not an 'employer' within the meaning of section 1401 and thus not obligated to submit to arbitration.

Id. at 886.

The Trust Fund's conclusion that the decision in *Levy Brothers Frocks* is "actually consistent" with the *Elliott* decision "since the corporation was deemed an employer by virtue of its prior, pre-withdrawal, relationship to its employees and the fund" is absurd. In *Levy Brothers Frocks* there were no intervening employers as there are in *H.C. Elliott.* In *Levy Brothers Frocks,* there was an identity of ownership throughout the relevant time period. In *Levy Brothers Frocks,* the Second Circuit pointed out that in a case such as *H.C. Elliott* where there are intervening employers, *there would be no withdrawal liability:*

> The question presented in the *Refined Sugars* litigation was whether a sugar refiner that had employed an independent trucking company to operate its fleet of trucks was an 'employer' with respect to the employees of the trucking company. *Refined Sugars,*

> *Inc.* v. *Local 807 Labor-Management Pension Fund*, 632 F. Supp. 630, 631 (S.D.N.Y. 1986) (*Refined Sugars II*). In *Refined Sugars II*, the Court concluded that the refiner was not an 'employer' within the meaning of MPPAA since (1) the refiner was not the 'direct employer' of the covered employees, *see* 29 U.S.C. § 1002(5); and (2) the refiner and the trucking company were not under common control within the meaning of 29 U.S.C. § 1301(b)(1). *Id.* at 632.

Id. at 884-885.

It is undisputed that H.C. Elliott and its independent carpentry subcontractors were not under common control. Because H.C. Elliott used independent contractors to perform all carpentry work after 1982, it stands reason on its head to hold that H.C. Elliott continued to be the direct employer of the same employees on whose behalf the Trust Fund now seeks to collect withdrawal liability.

The Trust Fund next incredibly asserts that a case whose key issue was who was an employer for purposes of the building and construction industry exception to MPPAA is somehow irrelevant to the issue before this Court. The decision of the Eighth Circuit Court of Appeals in *Union Asphalts & Road Oils* v. *Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988), is especially important due to the erroneous ruling by the Ninth Circuit that 29 U.S.C. § 1383(a)(1) was determinative as to Elliott's liability for withdrawal from the Multiemployer Pension Plan (*H.C. Elliott*, 859 F.2d 808 (9th Cir. 1988) at 813). Neither the legislative history nor the decision of the Eighth Circuit in *Mo-Kan* support this holding. Elliott's liability is controlled by § 1383(b), not § 1383(a). *See Union Asphalts & Road Oils, Inc.* v. *Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988) at 1232.

II. Respondent's Opposition Ignores The Statutes Legislative History And Erroneously Relies On Evidence Not Properly Part Of the Record Below.

The importance and substantiality of the question presented as to who is an employer for purposes of the building and construction industry exception to the Multiemployer Pension Plan Amendments Act of 1980 have in no way been rebutted. The Trust Fund has failed to address the fact that the decision below both conflicts with the legislative history of 29 U.S.C. § 1383(b)(2) and completely ignores the legislative exhortation that withdrawal liability for construction industry employers be "narrowly limited."

The Trust Fund quotes at length from a 1985 PBGC opinion letter in its Brief in Opposition (pp. 4-5). Elliott's Reply Brief in the court below and in its Petition noted that this same PBGC opinion letter was not properly part of the court record, incorrectly interpreted statutory requirements, and was contradictory of other PBGC letters (Appellant's Reply Brief, p. 12; Petition for Writ of Certiorari, p. 14).

Only after the parties had concluded their supplemental briefing as directed by the Court order, and the matter stood submitted, did the Trust Fund "discover" and mail this opinion letter to the Court. Documents filed after the entry of an order and which were not before the District Court when it made its order are not a proper part of the record on appeal and should not be considered on appeal. *See Wood* v. *Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1519 (9th Cir. 1983); *U.S.* v. *Cannons*, 534 F.2d 139, 140 (9th Cir. 1976).

In any event, this Court should disregard the aforementioned PBGC opinion letter because it incorrectly interprets the meaning of the statute here at issue and is contradictory to other opinion letters of equal weight.

In light of the inability of the Trust Fund to address the issues presented in the Petition without grossly distorting the clear meaning and legislative history of the statute and because the Trust Fund has all but ignored that a conflict exists among the circuits concerning who is a construction industry employer for withdrawal liability purposes, the need for plenary review of the action below is indisputable; indeed, Petitioner suggests that summary reversal is now in order.

DATED: April 14, 1989.

Respectfully submitted,

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